



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/47201/2014  
IA/47202/2014  
IA/47203/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
Heard on 9 August 2018  
Prepared on 10 August 2018

Decision & Reasons Promulgated  
On 23 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MOHAMED [J] - 1<sup>st</sup> Appellant  
ZAKKIYA [N] - 2<sup>nd</sup> Appellant  
H - 3<sup>rd</sup> Appellant  
(Anonymity orders not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr I Khan, Counsel

For the Respondent: Mr C Avery, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellants**

1. The three Appellants are all citizens of Sri Lanka. The 1<sup>st</sup> Appellant who I shall refer to as the Appellant was born on 2 September 1971. He is the husband of the 2<sup>nd</sup> Appellant

born on 28 August 1985 and the couple are the parents of the 3<sup>rd</sup> Appellant H who was born on 21 August 2007. They appeal against the decision of Judge of the First-tier Tribunal Morris sitting at Taylor House on 11 December 2017 who dismissed the Appellant's appeals against decisions of the Respondent dated 10<sup>th</sup> of November 2014. Those decisions were to refuse the Appellants' applications for leave to remain. The Appellant and 2<sup>nd</sup> Appellant have three other children Z born on 19<sup>th</sup> April 2010 and two children who were born on 24 August 2013 and 26 December 2015 and were thus four and two respectively at the date of the hearing in the first-tier.

2. On 9 November 2004 the Appellant entered the United Kingdom with a student entry clearance valid until 31 October 2005. This was subsequently renewed until 31 January 2009. The Appellant and 2<sup>nd</sup> Appellant married in Sri Lanka on 28 July 2006, the 2<sup>nd</sup> Appellant subsequently entered the United Kingdom as a student dependent and was granted leave in line with the Appellant's leave. On 30<sup>th</sup> of January 2014 the Appellant applied for leave to remain in the United Kingdom as a Tier 4 student and on 24 September 2014 submitted a family and private life application with the 2<sup>nd</sup> Appellant and H as his dependents. Z and the couple's third child were not included in that application. The Respondent refused that application on 10 November 2014 making removal directions pursuant to section 10 of the Immigration and Asylum Act 1999. The grounds for refusal related to an allegation that the Appellant had used a proxy test taker to obtain an English language certificate.

### **The Proceedings**

3. The Appellant appealed the matter which came before Judge of the First-tier Tribunal Abebrese at Taylor House on 21 October 2016. He allowed the appeal, noting that H was doing well at school and would have difficulties in acclimatising to the culture and society in Sri Lanka due to the fact that she had been present in the United Kingdom for all of her life. It would not be reasonable to expect her to leave the United Kingdom as she was aged 9 by the date of the hearing before the Judge.
4. The Respondent's allegation was that the Appellant had employed a proxy test taker in 2013 at Eden College and used that test in support of the Tier 4 student application made on 30 January 2014. Judge Abebrese rejected the claim of a fraudulent test see [36] of his determination. The Respondent appealed arguing the Judge had failed to give adequate reasons for his findings both as to the English language test and that H would be unable to adjust to life in Sri Lanka.
5. Permission to appeal was granted by Upper Tribunal Judge Gill on 10 July 2017 on the basis that it was arguable that Judge Abebrese had given inadequate reasons for resolving the deception issue in the Appellant's favour. At the subsequent error of law hearing Deputy Upper Tribunal Judge Ramshaw found a material error of law in Judge Abebrese's determination and remitted it back to the First-tier Tribunal to be reheard. The Deputy Upper Tribunal Judge upheld the findings that deception had not been employed in the taking of the English language test and that the Appellant's private life claim under paragraph 276ADE of the Immigration Rules failed. He did, however, find that Judge Abebrese had not given adequate reasons to explain why it was unreasonable to expect H to leave the United Kingdom. It was not enough to simply say that because H had been in the United Kingdom for nine years and had

never visited Sri Lanka inevitably she would have difficulties in acclimatising. There was no identification or analysis of what those difficulties might be.

### **The Appellant's Case**

6. In consequence the matter came before Judge Morris to rehear the appeal. The Judge summarised the evidence given by the Appellant and his wife at [9] to [14] of her determination. The couple had four children who had all been born in the United Kingdom and would like to remain here. The children did not speak Tamil fluently and although there was a school for them to attend in Sri Lanka it was not an English-speaking school. The family had no property or business in Sri Lanka and the Appellant feared that his mother and sister who remained in Sri Lanka lived with other family members in a 1 or 2 bedroom flat, although he admitted he had not asked them about that accommodation. In any event it was too small for the Appellant and his family to reside in. He had no idea how he would earn any money in Sri Lanka. He was not working at present, but he could obtain a job. He had a civil engineering qualification. In Sri Lanka he had worked as a building site supervisor for approximately two years.
7. The family had no contacts in the capital of Sri Lanka, Colombo and had no savings in the United Kingdom. His friends would not send help to him upon return to Sri Lanka they would only help him while he remained in the United Kingdom. The 2<sup>nd</sup> Appellant's family were in Sri Lanka, her mother, father, two sisters and two brothers. They would not be able to help the Appellant's family because they were themselves struggling to survive. The 2<sup>nd</sup> Appellant's family house in Sri Lanka consisted of two bedrooms plus a living room, kitchen, bathroom. Three families already lived in that property. Sometimes the 2<sup>nd</sup> Appellant spoke to her children in Tamil which they understood but they mainly understood English. She described how the Appellant had been given some money by his brother but he and the brother had fallen out over just how much money had been given.
8. In closing submissions, it was argued by counsel for the Appellant that the Respondent's decisions to remove the Appellants to Sri Lanka made pursuant to section 10 of the 1999 Act were unlawful because they were made on the basis of deception in an English language test which had been found by Judge Abebrese not to have occurred. Judge Morris rejected this argument at [21] as the grounds of appeal against the Respondent's decision had not referred to the effect of section 10 nor had it arisen at the error of law stage hearing before Judge Ramshaw.

### **The Decision at First Instance**

9. Judge Morris found that the matter which was before her was whether or not it would be reasonable to expect H to leave the United Kingdom. This was relevant under both the Immigration Rules at paragraph 276 ADE (1) (iv) and section 117B (6) of the Nationality Immigration and Asylum Act 2002. The Judge found that it was in the best interests of H that she should continue to be cared for by her parents whether that be in Sri Lanka or the United Kingdom. The Judge accepted that H would have developed friendships in the United Kingdom but her Tamil was not as limited as the Appellant and 2<sup>nd</sup> Appellant alleged. The Appellant and 2<sup>nd</sup> Appellant had given inconsistent

evidence about a number of matters including what family members remained in Sri Lanka and where they were and also what financial support the family were receiving.

10. There would be some difference in the curriculum of the education system in Sri Lanka compared to the United Kingdom, but the family would not be returning to Sri Lanka to destitution. The Appellant would be able to find accommodation and employment. Looking at the case outside the Immigration Rules, the Judge found the decision to remove the family was proportionate to the legitimate aim pursued. The Appellant had never had indefinite leave to remain and had been dependent on further leave being granted to allow him to stay in United Kingdom. There was no evidence from friends of the claimed financial support. She dismissed the appeal.

### **The Onward Appeal**

11. The Appellant's appeal against that decision, which was on generic grounds, argued that the Judge had not taken into account the principles referred to in **EV Philippines [2004] EWCA Civ 874** or the principles referred to in **Zoumbas [2003] 1 WLR 3690**. The grounds did not engage with the Judge's findings as such.
12. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Osborne on 30 May 2018. He had initially refused permission to appeal to the Respondent against the decision of Judge Abebrese on 31<sup>st</sup> of May 2017 but was overruled by Upper Tribunal Judge Gill (see [5] above). On 30 May 2018 he granted permission to appeal to the Appellant against the decision of Judge Morris. He wrote that in an otherwise detailed decision and reasons it was nonetheless arguable that Judge Morris had erred in failing to first find what was in the best interests of H and then consider what was reasonable and proportionate in the context of those best interests. All issues raised in the grounds were arguable. There was no reply to the grant from the Respondent.

### **The Hearing Before Me**

13. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the determination of the First-tier Tribunal such that it fell to be set aside and the matter reheard. If there was not the decision of the First-tier would stand.
14. For the Appellant, counsel made two points to support the argument that there had been a material error or errors of law. The best interests of H had not been considered and whilst it was acknowledged that the determination of the First-tier contained a detailed analysis of the facts, the test in **EV Philippines** had not been applied. H was a qualifying child and the exception under section 117B(6) had not been addressed properly. It was acknowledged that counsel in the First-tier had accepted there had been inconsistencies between the evidence of the Appellant and that of the 2<sup>nd</sup> Appellant but the unreasonableness test had not been properly applied by the Judge.
15. In reply, the Presenting Officer stated that Judge Morris had been alive to the position of H in the United Kingdom and had indeed given a detailed analysis. The determination was sufficiently reasoned and disclosed no error. In conclusion counsel sought to highlight that the issue of the alleged language test deception had been

decided in the Appellant's favour in Judge Abebrese's decision. The Appellant had been found credible on that point.

### **Findings**

16. The principal issue before Judge Morris was whether it would be reasonable to expect a qualifying child H to travel to Sri Lanka with her parents. By the time of the hearing H was 10 years old and at some stage could perhaps apply for British citizenship if that was the parents' wish. Of the other three children of the Appellant and 2<sup>nd</sup> Appellant, Z was also a qualifying child by the time of the hearing at first instance (although not at the date of the Respondent's decision as the Judge noted at [15]) but the third and fourth child were not qualifying children.
17. The Judge first had to assess what were the best interests of the children and this she did by stating that H's best interests (and by extension the other children's) were to remain in the care of their parents. Following the jurisprudence in cases such as the Court of Appeal decision in **MA Pakistan [2016] EWCA Civ**, powerful reasons were needed to demonstrate that it was reasonable to expect qualifying children to leave the United Kingdom. The difficulty for the Appellants was that the two adults had given contradictory evidence to the Judge on several key issues in the case. These included whether the family would have financial support upon return and the extent of their family connections in Sri Lanka.
18. The lack of candour by the adults could support the view that powerful reasons existed since the consideration of the reasonableness of expecting a qualifying child to leave the United Kingdom extends to wider public interest considerations not just the best interests of the child or children in question, see **MA**. Although the adults had had leave to remain in the past they were obliged to give truthful evidence to the Tribunal. The Judge was entitled to place appropriate weight in her assessment of the reasonableness test on the fact that the adults did not give credible evidence. Although the first Appellant had been found credible on the issue of the English language test that did not necessarily mean that he was a credible witness generally.
19. The Judge rejected the claim that H would be exposed to destitution upon arrival in Sri Lanka. The Judge accepted the submission made on behalf of the Respondent at the hearing that whilst it might be in the children's best interests to remain in the United Kingdom that was not the ultimate arbiter rather all matters had to be looked at in the round. H was receiving appropriate care from her parents and was developing appropriately. She was making good progress at school but there were adequate alternative facilities available in Sri Lanka and H would have the advantage of an excellent command of English. Had the evidence from the adults been given to the Judge in a more straightforward and consistent manner perhaps the outcome might have been different but that is to speculate on what might have been. The Judge had to deal with the case on the basis of the evidence before her.
20. The authorities and the Respondent's own guidance indicate strong reasons are required to show the reasonableness of requiring qualifying child to leave the United Kingdom. The Judge found that those reasons did exist. The grounds of onward appeal are in effect a mere disagreement with the result. The Judge looked at the matter

holistically and in particular at the issue of H's education. She was aware of how long H had been in the United Kingdom (and indeed the other children of the family) and gave appropriate weight to that consideration in her proportionality exercise both within and outside the Rules. H had experience of the culture of her country of origin, could speak the language and was adaptable. There was nothing to suggest the position of the other children was any different. Nor was there anything to suggest that the Judge did not ask the right questions in an orderly manner. She had a clear idea of H's circumstances and what was in H's best interests. Whilst another Judge on the same facts might have come to a different conclusion that is not an indication of a material error of law by this Judge. I do not find there has been any material error of law in the decision and I dismiss the Appellant's appeal.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity orders as there is no public policy reason for so doing.

Signed this 15 August 2018

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Judge Woodcraft  
Deputy Upper Tribunal Judge

**TO THE RESPONDENT**  
**FEE AWARD**

As I have dismissed the appeal there can be no fee award.

Signed this 15 August 2018

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Judge Woodcraft  
Deputy Upper Tribunal Judge